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In The
Supreme Court of the United States

WASHOE COUNTY, NEVADA
and
WESTERN WATER DEVELOPMENT CO., INC.
AND HAWTHORNE-NEVADA, INC.
d/b/a TRUCKEE MEADOWS PROJECT
PARTNERSHIP, A JOINT VENTURE
and
NORTHWEST NEVADA WATER
RESOURCES LIMITED PARTNERSHIP,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Federal Court should certify questions of state law to the highest court of the state when the senior law enforcement executive of the state declares the Court's interpretation of state law is in error, and such law is fundamental to the exercise of the state's sovereignty and to the disposition of the case?

PARTIES TO THE PROCEEDINGS

Petitioners are Washoe County, Nevada, a political subdivision of the State of Nevada, Western Water Development Company, Inc., a Nevada corporation, Hawthorne-Nevada, Inc., a Nevada corporation, and Northwest Nevada Water Resources Limited Partnership, a Nevada limited partnership.

Respondent is the United States of America.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners Western Water Development Company, Inc. and Hawthorne-Nevada, Inc. state that neither has a parent company nor a wholly owned subsidiary, save and except for their joint venture, the Truckee Meadows Project Partnership.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Washoe County, Western Water Development Co. Inc. and Hawthorne-Nevada Inc. d/b/a Truckee Meadows Project Partnership, a joint venture; and Northwest Nevada Water Resources Limited Partnership, respectfully petition this Court for writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, App. 1-15) is reported at 319 F.3d 1320 (Fed. Cir. 2003). The opinion of the court of federal claims (App. B, *infra*, App. 16-23) is unreported.

JURISDICTION

The court of appeals' judgment was entered on January 28, 2003. A timely petition for rehearing or in the alternative certification of questions of state law to the Supreme Court of Nevada was timely filed and denied on March 27, 2003. (App. C, *infra*, App. 24-25). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1948).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article Four Section Three Clause 2 of the United States Constitution provides, "The Congress shall have Power to dispose of and make all needful Rules and

Regulations respecting the Territory or other Property of the United States."

The Fifth Amendment to the United States Constitution provides in relevant part, " . . . nor shall private property be taken for public use without just compensation."

Nevada Revised Statute Section 533.324 provides:

> "**'Water already appropriated' defined.** As used in NRS 533.325, 533.345 and 533.425, "water already appropriated" includes water for whose appropriation the state engineer has issued a permit but which has not been applied to the intended use before an application to change the place of diversion, manner of use or place of use is made. (Added to NRS by 1993, 321)."

Rule 5 of the Nevada Rules of Appellate Procedure provides:

> "CERTIFICATION OF QUESTIONS OF LAW: (a) Power to Answer. The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, when requested by the certifying court, if there are involved in any proceeding before those courts questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state."

STATEMENT

This petition raises important questions concerning the Federal Courts' use of certification of novel and important questions of state law in furtherance of principles of judicial federalism. Specifically, it seeks certification of three questions concerning Nevada water law, which as interpreted by the federal circuit will have a devastating effect on Nevada's sovereignty and control over its most important resource: water. It also raises questions of Constitutional import concerning Congress' plenary power over public lands.

I. Factual & Procedural Background

Washoe County, Nevada, location of the Cities of Reno and Sparks, applied to the Nevada State Engineer for permits to pump ground water from a valley 38 miles north of the urban area for municipal and industrial use in the urban area. Previously the County had gained control of the valley's agricultural water permits through an arrangement with the local rancher, Northwest Nevada Water Resources Limited Partnership. This arrangement provided for agricultural uses in the valley to be eliminated as the ground water was put to municipal and industrial uses in the urban area. (For brevity and clarity purposes, Northwest Nevada and its predecessor, Fish Springs Ranch Ltd., are hereinafter referred to as the "Ranch".)

The State Engineer issued a ruling for the issuance of the municipal and industrial permits. Thereafter pursuant to the Federal Land Policy and Management Act, 43 U.S.C. § 1701, et seq. ("FLPMA"), the Bureau of Land Management processed an application for a right-of-way

across the intervening 38 miles, almost all of which are undeveloped public lands. As a final Environmental Impact Statement was being prepared, the Secretary of the Interior stopped the process in response to complaints from an adjoining Army ordnance depot that had contaminated a portion of the groundwater basin from which the County would draw its water and feared the County's pumping would increase its cost of cleanup from $100 million to as much as $1 billion. In addition the Pyramid Lake Paiute Indian Tribe threatened its own "takings" claim if water was removed.

The net effect of the Secretary's action was to transfer to the County, the Army's cost of cleanup and the Federal government's cost of meeting its trust obligations to the Tribe. Therefore the County, its private sector "partner" in planning the pipeline project and the Ranch sued the United States in the Court of Federal Claims for a "takings" under the Fifth Amendment to the Constitution.

Plaintiffs asserted two alternative theories to support their takings claim. First, they asserted that the United States had physically appropriated their water rights by denying their right-of-way application in order to keep the water appropriated by the rights in the ground where it would inure to the benefit of the Army and the Tribe. Second, Plaintiffs asserted that the United States had taken their water rights by regulatory action under FLPMA by denying plaintiffs all meaningful access to the water appropriated by their water rights and/or by giving a veto to the Army and the Tribe over the right-of-way decision.

As there were no disputed issues of material facts, the matter was submitted to the Court of Federal Claims on cross motions for summary judgment. The Court of

Federal Claims ruled against Plaintiffs declaring that no regulatory action had impacted Plaintiffs' property because the federal government had the same rights as a private property owner to exclude adjoining property owners from crossing public lands. Plaintiffs, now Appellants, appealed to the Court of Appeals for the Federal Circuit for de novo review. The Court of Appeals also denied Appellants' claim, making two interpretations of Nevada water law not included in the Court of Federal Claims' opinion and concurring in the Court of Claim's view of the federal government's private property rights.

Focusing on the erroneous interpretations of Nevada water law, Appellants petitioned the Court of Appeals for panel rehearing. The Attorney General of Nevada and the State Engineer of Nevada joined by Amicus Curiae Brief. All parties asked the Court to either reconsider its interpretation of Nevada water law or certify the questions to the Supreme Court of Nevada pursuant to Nev.R.App.P.5.[1] The Court of Appeals denied Appellants petition by order without opinion.

Petitioners bring this petition solely for the purpose of obtaining a dispositive ruling from the Nevada Supreme Court on the nature of the property right and to return to

[1] RULE 5. CERTIFICATION OF QUESTIONS OF LAW: (a) Power to Answer. The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, when requested by the certifying court, if there are involved in any proceeding before those courts questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state.

the Court of Appeals freed of any misconception by that Court regarding the law of Nevada. The government may argue that the determination of property rights under Nevada law is not relevant to the regulatory takings aspect of the case but this position is misguided. *See Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1992) and discussion of appropriation of property below. If after certification, the Court of Appeals still finds a regulatory takings analysis appropriate and adheres to its prior ruling on that issue, then petitioners can seek appropriate relief from this Court on the issue in the form of Questions Presented set forth in the footnote below.[2] In the alternative, this Court may wish to address these issues at this time.

II. Certification of Issues of State Law

Certification of the state law issues in this case is appropriate for the same reasons it would have been appropriate in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). In that case the Arizona Attorney General asked both the federal district court and circuit court to submit an Arizona statute to the Arizona Supreme Court for interpretation before the Federal Courts determined its efficacy under the United States Constitution. In

[2] Based upon the current Court of Appeals' opinion, the additional Questions Presented would include: Is the Federal Land Policy Management Act, 43 U.S.C. § 1701, et seq., an exhaustive exercise of Congress' plenary power over public lands or does the United States hold rights in public lands analogous to those of private real property owners? If the rights of the United States as owner of public lands are analogous to the rights of a private party, what law defines those rights?

response to the appeals court's refusal to certify, this Court declared, "Given the novelty of the question and its potential importance to the conduct of Arizona's business, plus the view of the Attorney General . . . , the certification requests merited more respectful consideration than they received in the proceedings below." 520 U.S. at 80.

Nevada Water Law

The novelty of the laws in question are testified to by the Attorney General of Nevada and the State Engineer of Nevada, the two senior members of the executive branch of state government charged with administration of Nevada water law. In their Amicus Brief they declare to the court of appeals, "Like other Western States, Nevada has a unique body of water rights law that does not exist in other parts of the country where water is more plentiful. A proper understanding and recognition of this body of law is of the utmost importance to the State of Nevada." (Nev. Att'y General's Amicus Br. at 1.)

Since its admission in 1864, Nevada has developed an appropriative water law system that is shared in general terms with other Great Basin states but contains many unique features. Of greater importance, this appropriative water law system is not shared by and little understood in states outside the Great Basin. An analysis of the court of appeals' interpretation of Nevada water law is illustrative.

In deciding that the government had not denied Appellants all meaningful access to their property as in *Drakes Bay Land Co. v. United* States, 424 F.2d 943 (Ct. Cl. 1979), the court of appeals declared:

> "Indeed, Appellants do not dispute that they exercised that right by using the water for its original agricultural use, albeit because they were unable to perfect the new M&I use. *See, e.g.*, Nev. Rev. Stat. § 533.060, 533.380, 533.395. (Appellants would need to actually put the water to the new use in the new location to perfect those new use water rights.)"

Washoe County, 319 F.3d at 1327.

The Nevada Attorney General and State Engineer focused their Amicus Brief primarily on the interpretation of Nevada water law contained in the foregoing parenthetical sentence:

> "(I)t appears in the context of this Opinion that this Court effectively held that the right to use water does not arise with the issuance of a permit to change the place or manner of use, but rather that the right arises after the water right has been perfected. This is incorrect, however, since the right to use water arises immediately upon the issuance of a permit, and not upon perfection. Nev. Rev. Stat. 533.325. A permit – not its perfection – creates the right to immediate use of the water. Nev. Rev. Stat. 533.380(1)(b)."

Nev. Att'y General's Amicus Brief at 2.

The reason the Nevada Attorney General and State Engineer focused on this interpretation is that the Federal Circuit is the second federal court of appeals to misinterpret this same principle of Nevada water law. In 1989, the Court of Appeals for the Ninth Circuit interpreted Nevada water law so that applications to change the place and/or manner of use could be granted by the State Engineer only if the water had been put to beneficial use previously, *United States v. Alpine Land & Reservoir Company*, 878

F.2d 1217, 1226 (9th Cir. 1989). While the Ninth Circuit's opinion does not use the word "perfection", the concept is the same. A perfected water right, called a "certificated" right in Nevada, is one in which the appropriated water has been put to beneficial use, *see* Nev. Rev. Stat. §§ 533.425, 533.430. Under the Ninth Circuit's rule if the water had not been perfected its place and manner of use could not be changed by the State Engineer.

In 1993, the Nevada Legislature adopted legislation for the express purpose of memorializing the contrary preexisting Nevada rule and reversing the Ninth Circuit's perfection rule. The resulting Nev. Rev. Stat. § 533.324 reads:

> "**'Water already appropriated' defined.** As used in NRS 533.325, 533.345 and 533.425, "water already appropriated" includes water for whose appropriation the state engineer has issued a permit but which has not been applied to the intended use before an application to change the place of diversion, manner of use or place of use is made. (Added to NRS by 1993, 321)."

The Legislature acted because the perfection issue has importance beyond the granting of change applications. Water rights are considered real property under Nevada law, *In re Filippini,* 202 P.2d 535, 537 (Nev. 1949)[3] and are treated as such in Nevada condemnation proceedings,

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[3] Water rights are also considered real property for federal income tax purposes. *See, e.g., Day v. Comm'r*, 54 T.C. 1417 (1970); *Subsurface Water Rights*, Rev. Rul. 73-341, 1973-2 C.B. 306 (water rights are real property eligible for capital gains treatment); *Revenue Ruling*, 55-749, 1955-2 C.B. 295 (water rights to be treated as real property).

Carson City v. Estate of Lompa, 501 P.2d 662 (Nev. 1972). The question at the heart of the perfection issue is when in the appropriative process does the holder obtain his or her property right. If the property right does not arise until the original appropriation has been placed to beneficial use (i.e., "perfected" as a certificated right) as the court of appeals says in this case, then permit holders do not have protection under the Fifth Amendment's Takings Clause.

This result would have an enormous adverse impact on Nevada's administration of its water resources and on its relationship with the United States. Most of Nevada's water rights are held in permit form, approximately 87% of Nevada's land surface is owned or protected by the United States[4] and four of its five river systems are interstate waterways.[5] Thus the federal courts' interpretation of this aspect of Nevada water law would result in a situation in which the Federal government without consequence to it can vitiate by its control of land and waterways all water permits except for those that are used on private lands surrounding the source of the water. The net effect of this circumstance would be to deny to the State of Nevada one of the most important aspects of its

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[4] *"It's Your Misfortune and None of My Own", a History of the American West*, Richard White, University of Oklahoma Press, Norman, Oklahoma (1991) at page 565.

[5] Nevada contains parts of five rivers. Three rise in California and terminate in Nevada: the Truckee, Carson and Walker; the Bruneau, Owyhee and Jarbidge Rivers rise in Nevada and terminate in the Snake River in Idaho; the Colorado River rises in Colorado and Wyoming and terminates at the Gulf of California. Only the Humboldt River rises and terminates in Nevada. *Nevada Water Facts*, State of Nevada, Department of Conservation and Natural Resources, Division of Water Planning, Carson City, Nevada (1992).

sovereignty and control over its most important resource: water.

This is the real issue underlying the "perfection" question and the matter that raises the greatest public policy concerns not only to those who administer Nevada water law but also those who rely on it for the conduct of their daily businesses.

In light of the foregoing, the Court of Appeals should have certified the following question to the Supreme Court of Nevada:

1. At what point in the appropriation process (application, permit or certificate) does the holder obtain a real property interest in the appropriated water?

In furtherance of deciding that the government had not directly appropriated Appellants' property as in *Lucas*, 505 U.S. 1003 (1992), the court of appeals declared:

> "Appellants' constitutionally protected property was the right to use the water on the Ranch. Thus the State Engineer did not confer an additional or separate and distinct water right. The State Engineer only authorized a change in place and manner of use of its pre-existing water rights from agricultural to M(unicipal) & I(ndustrial) use. See *Pyramid Lake Paiute Tribe of Indians*, 918 P.2d at 698."

Washoe County, 319 F.3d at 1327.

Under Nevada law, the State Engineer appropriates water to be drawn at a specific rate from a specific location for a specific use at a specific location. Nev. Rev. Stat. §§ 533.335, 533.340, 533.345, 533.350 (2002). Water

allocated for one purpose at one location cannot be used for another purpose at another location. Nev. Rev. Stat. § 533.330 (2002).

The State Engineer ruled that the County could pump water from locations at the Ranch for municipal and industrial use in Reno and Sparks. The County did not have the right under its permits to use the pumped water for agriculture at the Ranch. The Ranch did have the right under preexisting permits to pump water for agriculture at the Ranch. Once the County commenced pumping water under its permits, the Ranch's agricultural rights would be extinguished. *See* Nev. Rev. Stat. § 533.040(2).

The specialized language of Nevada water law may have confused the court of appeals, further demonstrating the appropriateness of certification. In support of its interpretation of Nevada water law in the above referenced paragraph, the court of appeals cites *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 918 P.2d 697 (Nev. 1996). In the cited opinion, the Nevada Supreme Court affirmed the State Engineer's Ruling allowing the County's permits on public interest grounds, describing the facts as follows:

> "Washoe County filed thirty-one 'inter-basin' applications to transfer water from Honey Lake (Valley) to the Truckee Meadows metropolitan area (Reno and Sparks). Several of the applications were to change FSR's and NNWR's (the Ranch's) existing water rights to industrial and municipal use."

Pyramid Lake, 918 P.2d at 698.

The Nevada Supreme Court's description of the procedural process for reappropriating water already

appropriated ("to change . . . existing water rights . . . ") is customary western water terminology. However, the conclusions drawn by the court of appeals from this language do not follow. Under the Nevada statutory scheme the County could not have used the water appropriated to municipal and industrial uses in Reno and Sparks for agricultural purposes at the Ranch. Further the language "to change . . . existing water rights to industrial and municipal use" does not mean that the permits issued to the County were not separate and distinct from the permits previously issued to the Ranch, as the court of appeals concluded. *See* Nev. Rev. Stat. § 533.325 [separate permit required for change in point of diversion, place of use and/or manner of use of water already appropriated]; Nev. Rev. Stat. § 533.330 [permit for one source and one use only]; Nev. Rev. Stat. § 533.345 [content of application to change point of diversion, place of use and/or manner of use].)

In light of the foregoing, the court of appeals should have certified the following two additional questions to the Supreme Court of Nevada:

2. Can the holder of a permit for water to be used for municipal and industrial purposes, use the same water for agricultural purposes under the terms of its municipal and industrial permit?

3. Is a permit for the use of water for municipal and industrial use at one location a separate and distinct right from a prior permit for the use of the same water for agricultural use at a different location?

REASONS FOR GRANTING CERTIORARI

I. Certification

In addition to the importance of this matter to the State of Nevada explained above, the Court should grant this petition for a writ of certiorari because the facts of and opinions in this case provide this Court, in its supervisory role over the lower Federal courts, the opportunity to provide further guidance on the primary principle to be advanced by the certification process: judicial federalism. Further, there is a conflict not only between the Court of Appeals for the Federal Circuit and this Court on when certification should be used, but also conflicts between this Court and certain Circuits and the Circuits themselves on when the certification decision should be made and why.

Certification developed as a means of expediting cases subject to the rule in *Railroad Comm'n v. Pullman Company*, 312 U.S. 496 (1941) that federal courts should abstain from deciding constitutional issues if questions of state law would prove dispositive of the case. This Court first ordered a lower federal court to use the certification process in *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960) but provided little guidance on when certification is appropriate. The first guidance came in *Lehman Brothers v. Schein*, 416 U.S. 386 (1974):

> "It (certification) does . . . in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.
>
> Here to resort to it would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant State. When federal judges in

> New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction."

363 U.S. at 391 (Footnote omitted.)

In a concurring opinion in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), Justice O'Connor, joined by Justices Burger and Rehnquist, gave an implied endorsement to certification and provided guidance for a *Pullman* abstention in a First Amendment case that was cited by the Court as appropriate considerations for certification in *Arizonans for Official English*. Justice O'Connor wrote:

> "(A)bstention may be required 'in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.' (Citations omitted.)
>
> The decision of the Court of Appeals represents a premature and avoidable interference with the enforcement of state law in an area of special concern to the States. Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when ... the state courts stand willing to address questions of state law on certification from a federal court."

472 U.S. at 510.

Finally in the section of *Arizonans for Official English*, cited at the beginning of this section, the Court added the concepts of a state statute's "importance to the conduct

of . . . (a State's) business, plus the views of the Attorney General" to the certification decision criteria. 520 U.S. at 78. In addition the Court criticized the appeals court for attempting to extract a concession from the Attorney General in exchange for certification. 520 U.S. at 77.

In sum, this Court has provided the following principal points for consideration by the lower federal courts in making a certification decision:

– It saves time, energy and resources (*Lehman Brothers*), and

– it helps build a cooperative federal judicialism (*Lehman Brothers*), and

– it is particularly appropriate for novel and unsettled questions of state law (*Lehman Brothers*), and

– it helps overcome problems of judicial distance so that judges without common exposure to local law, do not have to predict unsettled state law issues (*Lehman Brothers*), and

– it avoids unnecessary friction in federal-state relations (*Brockett*), and

– it avoids tentative decisions on state law ("tentative" because they remain subject to reversal by the highest court of a state) (*Brockett*), and

– it avoids premature Constitutional adjudications (*Brockett*), and

– it should be used where the issue is important to the conduct of the state's business (*Arizonans for Official English*), and

– the views of the relevant state attorney general should be given respectful consideration (*Arizonans for Official English*).

Finally, the decision to grant or deny certification should not be made a bargaining chip in the litigation (*Arizonans for Official English*).

Since this Court's adoption of certification as a tool in accelerating *Pullman* type abstentions and in particular since its endorsement as a means of avoiding federal/state conflicts in *Arizonans for Official English*, the lower federal courts have shown a growing willingness to use the process to resolve important unsettled questions of state law. In this process a number of courts of appeal have added another consideration to this Court's list: the likelihood the unsettled important issue of state law is likely to recur. *See, e.g., Green v. Montgomery,* 219 F.3d 52 (2nd Cir. 2000); *State Farm Mut. Auto Ins. Co. v. Pate,* 275 F.3d 666 (7th Cir. 2001). As discussed above, recurrence has occurred already with regard to the state law issues in this case and because of the importance of the perfection issue, recurrence is likely in the future if the court of appeals' opinion of Nevada water law is not certified to the Supreme Court of Nevada.

However, some federal courts, like the Federal Circuit in this case, have shown an absolute or substantial disdain for the certification process. In these cases the courts have misconstrued the Court's dictum in *Lehman Bros.* that certification's "use in a given case rests in the sound discretion of the federal court." 416 U.S. at 391. In a number of these cases, the courts of appeal have refused to certify because one of the litigants did not seek certification until after they lost in the trial court. *See Perkins v.*

Clark Equipment Co., Melrose Div., 823 F.2d 207, 209-210 (8th Cir. 1987), cited with approval in *Rural Water System #1 v. City of Sioux Center*, 202 F.3d 1035 (8th Cir. 2000); *Enfield ex rel. Enfield v. A.B. Chance Co.*, 228 F.3d 124 (10th Cir. 2000); *Stuart v. Colorado Interstate Gas Co.*, 271 F.3d 1221 (10th Cir. 2001). In another case, the court of appeals required the party seeking certification to show a particularly compelling reason because the litigant had lost in the district court. *McLinn v. F/V Fjord,* 744 F.2d 677, 681 (9th Cir. 1984); *Commonwealth Utilities Corp. v. Golten Trading & Engineering PTE Ltd.*, 313 F.3d 541 (9th Cir. 2001). In yet another, the court of appeals held that parties who choose to litigate state law questions in federal court under diversity jurisdiction are presumptively disallowed a second bite at the apple via certification. *Basic Controlex Corp., Inc. v. Klockner Moeller Corp.*, 202 F.3d 450 (1st Cir. 2000).

The problem with this approach is that it focuses on the wrong principle. The question presented in making a certification decision is not which party won or lost on the contested state law issue or even who raised the issue. *See Lehman Bros., supra*, where one party prevailed on the state law issue at the trial court and the other prevailed on the same issue in the court of appeals. The real issue is would the federal court's determination of the issue strike at the heart of the sovereignty reserved to the states by the Tenth Amendment and generate increasing friction between the federal and state court systems (and presumably thereby, between the federal government and the states). Of the ten factors this Court has declared relevant to the certification decision listed above, a clear half go to this principle.

Further, a rule that forecloses certification after a state law issue has been contested in a federal court would force party litigants to ask for certification in every case that presents an unsettled important question of state law to a federal court before the matter is heard by the federal trial or appellate court. Such a rule would inundate the federal court system with certification requests and bury the certification process. In addition, such a rule would be particularly egregious where, as in this case, the trial court did not rule on the state law issues and appellants did not know about the appellate court's confusion over state law issues until its opinion was rendered.

In conclusion, there are three reasons peculiar to this case that compel this Court to grant Appellants' Petition and certify the state law issues herein to the Supreme Court of Nevada.

First, of the ten reasons for certification enunciated by this Court, all appear within the factual context of this case. However, one of the ten is particularly applicable: judicial distance. Without impugning the integrity of the Court of Appeals for the Federal Circuit, the fact is that it is a long way from the deserts of Nevada to shores of the Atlantic Ocean and the conditions and laws involving fresh water are substantially different. If federal judges in New York are "outsiders lacking the common exposure to local law which comes from sitting in the jurisdiction", *Lehman Bros.*, 416 U.S. at 391, then judges in Washington, D.C. must feel like they are dealing with matters on

the far side of the moon when considering Nevada water law.[6]

Second, the principal plaintiff and defendant in this case are not simply citizens seeking redress for or defense against a grievance in a federal court on diversity grounds. Here the plaintiff is a political subdivision of a state and the defendant is the United States. In furtherance of the precepts of federalism, it would seem particularly appropriate for the defendant within whose courts the plaintiff must appear for redress, to certify questions about the state law of plaintiff's jurisdiction to the courts of that jurisdiction. For the federal courts to refuse a request for such certification, with or without opinion, not only offends the principles of federalism advanced in this Court's prior certification opinions but also raises the appearance of conflict, which cannot help but be deleterious to healthy federal/state relations. This consideration should be added to the Court's list of reasons for certification.

Finally, it is important to note that Nevada is the driest state in the Union.[7] It is the State that after a visit, led Mark Twain to his famous quip that in the west, "Whisky is for drinking, and water is for fighting about." To Nevada, there is no more important legal issue to the

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[6] In surveying certifications since the procedures adoption by this Court, the Eleventh Circuit, which includes the State of Florida where certification was first instituted, has used the device most: over 250 times. The Federal Circuit has used it least: once.

[7] *Water Atlas of the United States*, J.J. Geraghty, D.W. Miller, F. Van Der Leeden, and F.L. Troise, Water Information Center, Port Washington, N.Y. (1973), quoted in *Nevada Water Facts*, *supra*, at page 10.

conduct of its business than its water law. There is also no greater example of a legal issue the certification of which will further the principles of judicial federalism. Certification of the foregoing issues will implement the Constitution's division of policy-making powers between the federal government and the states by allowing Nevada to decide how it wishes to interpret, implement and, if necessary, augment its water law.

III. Constitutional Issues.

The lower courts' opinions in this case have raised issues of Constitutional import: what are the rights of the United States in its capacity as owner of the public lands and what law should be applied to define those rights? These questions are raised in this Petition but petitioners ask the Court to abstain from considering them until the certification process is complete in accord with *Pullman*, *supra*, and its progeny, which require that state law issues be addressed prior to the Federal courts addressing Constitutional issues.

The Issues

These issues first arose in the Court of Federal Claims' opinion. In responding to plaintiff's assertion that the United States denial of its right-of-way application through the FLPMA process constituted a regulatory taking under *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 394-95 (1922) and *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990), the court declared:

> "According to plaintiffs here, '[b]ecause the only feasible way to transport water from plaintiffs' land . . . is through a pipeline over defendant's

> land . . . , defendant's denial of a pipeline easement has completely eviscerated plaintiffs' property and deprives plaintiffs of all economic use of that property.' However, defendant's relationship with plaintiffs is that of a neighboring landowner, not a regulator.
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> * * *
>
> In this case, the Government is not acting in its regulatory capacity. It is acting as a landowner whose neighbor seeks its permission to dig a pipeline across its property. Most landowners could not imagine that a neighbor would require them to grant an easement for a commercial venture because otherwise it would not be profitable. We are not aware of a case in which the Government as landowner has been required to do so either."

Court of Federal Claims Op., 5-6; App. 21.

The Court of Appeals endorsed this approach, writing in its opinion:

> "(T)he government was acting as a landowner whose neighbor sought permission to lay a pipeline across its property. However, the government had no obligation as a neighbor to assist Washoe County or the other Appellants in putting their water rights to the most profitable use or to pay just compensation because the State of Nevada granted Washoe County authorization under state law to make a particular use of the water on the Ranch. Because the government did not impose any regulations on Appellants' water rights, it did not effect a regulatory taking."

Washoe County, 319 F.3d at 1327, 1328.

The problem with this analogy to the rights of private property owners is two-fold. First, it sets up a series of cascading conundrums that cannot withstand scrutiny under existing opinions of this Court concerning Congress's plenary powers over public lands and the relations of the Federal government and the states concerning public lands, as more fully discussed below. Second, the United States is not a private party; it is the supreme authority, the sovereign. U.S. Const. art. VI, cl. 2.

The United States is a government of enumerated powers set forth in the Constitution, *City of Boerne v. Flores*, 521 U.S. 507 (1997). When acting within the powers enumerated in the Constitution, its authority is supreme. *M'Culloch v. State*, 17 U.S. (4 Wheat.) 316 (1819); *Graves v. People of State of New York ex rel. O'Keeffe*, 306 U.S. 466 (1939).

The relevant enumerated power is contained in Article IV, § 3, cl. 2 of the Constitution: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This Court has declared that the Congress holds the public lands as trustee for the people and its power over the public lands is without limitations. *United States v. City and County of San Francisco,* 310 U.S. 16 (1940). Every acquisition, holding or disposition of property by the Federal government depends upon the proper exercise of a constitutional power. *United States v. County of Allegheny*, 322 U.S. 174, 182 (1944).

The relevant "Property" is open rangelands commonly called the "public lands" as distinguished from Federal real property that has been developed or set aside for a

special purpose, commonly called "Federal enclaves". *Rawson v. United States*, 225 F.2d 855, 857 (9th Cir. 1955).

Congress exercises its powers through legislation. U.S. Const. art. I, § 8, cl. 18. It has done so here by enacting a comprehensive statutory scheme to regulate the public lands: the Federal Land Policy and Management Act, *supra*. FLPMA contains an extensive regulatory scheme for making decisions on rights of way across federal lands, 43 U.S.C. § 1761, et seq. A plain reading of these provisions shows they are objective in that they prescribe a regulatory scheme which if met allows applicants rights of way across public lands. These provisions are not subjective in that they vest in the United States the discretionary rights that are the hallmark of private property ownership.

Thus the Constitutional question presented by the lower Federal courts' declarations that the United States holds rights over public lands analogous to those of private property owners is whether FLPMA is an exhaustive Congressional exercise of its powers under Article IV, § 3, cl. 2 concerning rights of way across public lands or does the Congress as trustee for the public hold other additional rights implied by Article IV, § 3, cl. 2 or some other provision of the Constitution?

FLPMA as Exhaustive Congressional Exercise

The better answer to this question is that FLPMA is the current exhaustive Congressional exercise of its

powers concerning rights of way across public lands.[8] This concept is supported by *United States v. City and County of San Francisco, supra*, where in this Court held that it is not for the courts to say how the trust shall be administered but rather it is for Congress to determine. 310 U.S. at 29, 30. Further if the Congress felt the need for rights analogous to those of private property owners it could have enacted such rights as it did with regard to criminal law in the Federal Assimilative Crimes Act of 1948, 18 U.S.C. tit. 13, which adopts the criminal law of the state within which a federal enclave is located for the enclave. Similarly, in FLPMA § 505(a)(iv), Congress adopted State standards concerning public health and safety, environmental protection, and siting, construction, operation, and maintenance of rights-of-way, if those standards are more stringent than applicable Federal standards, 43 U.S.C. § 1765(a)(iv) (1986).

Defining Private Property Rights

If the answer is that the United States is to be imputed to have rights analogous to private parties over public lands, then the question becomes how to define such rights? This question arises because private property rights are generally prescribed by state law, *Davies Warehouse Company v. Bowles,* 321 U.S. 144, 155 (1944).

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[8] Since the founding of the United States, Congress has enacted thousands of laws affecting public lands. In 1976, it enacted FLPMA to consolidate the residuals of these laws and provide a comprehensive and coherent statement of Federal policy and procedure regarding the public lands. *See* 1976 U.S. Code Cong. and Admin. News at 6175 (1976 USCCAN 6175).

This choice of law analysis turns on whether the analogous private property rights of the United States are to be determined by the rules of Federal Common Law under *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) or are the property laws of the states to be used as the rules of decision pursuant to *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). In *Clearfield Trust*, this Court found that the right to recover for conversion of a cheque drawn on the Treasury of the United States is a federal right that requires a uniform nationwide rule of decision in the form of Federal Common Law. If the doctrine of *Clearfield Trust* were to be applied in this case, the first conundrum would be reached by returning to the questions: (1) Is FLPMA the uniform nationwide expression of federal policy, and (2) does Congress' failure to adopt analogous private property rights express an intent to rely on the laws of the states for the interstices not included in the Act?

In light of the foregoing, it would appear that the better choice of law is to rely on *Kimbell Foods* where this Court held "when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision." 440 U.S. at 726. This state law approach is supported by a number of factors including the facts that land is the most important basis for almost every state's economy, and the adoption of two separate rules of law regarding its character would cleave a number of states, particularly the fast growing western states, into two separate dominions defeating the assignment of policy making between the federal government and states that form one of the foundations of the Federal Constitution.

Further this approach is supported by past practice in which the federal government has relied on state property

law to enforce its rights in the public lands. An early opinion of this Court declared that as an owner of property in almost every State of the Union, the United States should have the same right to have it protected by the local laws that other persons have. *Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1850). In fact, the United States has from time to time utilized local laws in protecting its interests in its property, particularly enclave property. *See, e.g., Powers v. U.S. Postal Service*, 671 F.2d 1041 (7th Cir., 1982); *Metropolitan Life Ins. v. United States*, 107 F.2d 311 (6th Cir. 1939). This fact leads to the second conundrum that the analogous private property rights approach presents: it would seem a true affront to the principles of federalism to declare that the United States can rely on state private property law to enforce its rights but does not thereby suffer the obligations of all similarly situated parties.

The foregoing leads to the final conundrum of this approach. Under Nevada law, private property owners are obligated to provide a right-of-way across their lands in order to allow their neighbors to move water appropriated by the State Engineer to its ultimate place of use, Nev. Rev. Stat. §§ 533.050, 536.070. Such an approach is of course preempted by FLPMA § 1761, et seq., which returns this analysis to its starting point and demonstrates the efficacy of holding that FLPMA is the current exhaustive exercise of Congress' plenary power over public lands.

II. Constitutional Issues

The facts of and opinions in this case provide this Court with the opportunity to consider the exhaustive effect of the Federal Land Policy and Management Act.

While the issues of whether FLPMA is an exhaustive expression of Congressional policy over public lands and if not, how to define the analogous private property rights of the United States in public lands seem to be issues of first impression, this Court should grant this petition for the same primary reason it should certify the questions of state law: federalism.

Most of the public lands impacted by these questions lie in the western United States where population growth is greatest. For example, the land surface of the two fastest growing states in the Union, Arizona and Nevada, are 83% and 87%, respectively, owned or protected by the United States.[9] In these circumstances, conflicts between the predominant landholder, the United States, and the minority landowners, the citizens of the states and the states themselves, cannot help but arise. These conflicts have and will impact on the continued growth of the states and will continue to increase federal/state tensions. This Court could provide no greater service to commonweal at this time than to resolve the rules of decisions for such conflicts before such conflicts become rampant and differing circuits provide differing rules, which will further

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[9] AZ: *The New Encyclopedia of the American West*, Howard R. Lamar, Editor, Yale University Press, New Haven, Connecticut (1998) at page 46; NV: *"It's Your Misfortune . . . "*, *supra*, FN 3 above.

exacerbate federal/state relations. Finally, such a resolution of the rules of decision will assist Congress in determining whether, as trustee of the public lands, it needs to further define its plenary power under Article IV, § 3, cl. 2 of the Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
for the Federal Circuit

02-5039

WASHOE COUNTY, NEVADA; WESTERN WATER DEVELOPMENT CO., INC. AND HAWTHORNE-NEVADA, INC. (doing business as TRUCKEE MEADOWS PROJECT PARTNERSHIP); and NORTHWEST NEVADA WATER RESOURCES LIMITED PARTNERSHIP,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Richard J. Conway, Dickstein Shapiro Morin & Oshinsky LLP, of Washington, DC, argued for plaintiffs-appellants. With him on the brief were *Bernard Nash, James vanR. Springer, C. Ernest Edgar IV*, and *Michael J. Slattery*.

Ethan G. Shenkman, Attorney, Environment & Natural Resources Division, Policy Legislation and Special Litigation Section, Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were *Thomas L. Sansonetti*, Assistant Attorney General; *Kathryn E. Kovacs*, and *Fred R. Disheroon*, Attorneys, Appellate Section.

Appealed from: United States Court of Federal Claims

Judge Robert H. Hodges, Jr.

DECIDED: January 28, 2003

Before CLEVENGER, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and PROST, *Circuit Judge*.

PROST, *Circuit Judge*.

Appellants, Washoe County, Nevada, Western Water Development Co. Inc. and Hawthorne-Nevada, Inc. (doing business as Truckee Meadows Project Partnership), and Northwest Nevada Water Resources Limited Partnership (collectively "Appellants"), appeal the decision of the United States Court of Federal Claims granting summary judgment to the United States and denying their motion for partial summary judgment. The court held that the government did not effect a taking of Appellants' private property, specifically their water rights. Because we agree with the court that a taking was not effectuated, we affirm.

BACKGROUND

In the State of Nevada all water sources within the state belong to the public Nev. Rev. Stat. 533.025. Although a water right is property subject to constitutional protection, it is usufructuary in nature, meaning that it is a "right to use" water in conformance with applicable laws and regulations. At issue in this case is the Fish Springs Ranch ("Ranch") and its appurtenant groundwater, located in the Honey Lake Valley of Washoe County, Nevada, near the California border. Located approximately ten miles east of the Ranch is Pyramid Lake, home to the Pyramid Lake Tribe of Indians ("the Tribe"). Approximately eight miles west of the Ranch, in Lassen County, California, is a

United States Army Depot ("the Army"). The Ranch is located approximately forty miles north of the Reno-Sparks metropolitan area, also a part of Washoe County.

In the mid-1980s, the principals of Northwest Nevada Water Resources Limited Partnership ("Northwest Nevada") acquired title to the Ranch and its appurtenant ground and surface water rights. The water rights held by the principals of Northwest Nevada permitted them to draw certain quantities of groundwater from wells located on the Ranch and to use the water for agricultural purposes within the Honey Lake Valley. The principals formed the Northwest Nevada partnership in 1987 after realizing that they could sell their water rights, rights associated with the water on the Ranch as well as other water sources, to the Reno-Sparks metropolitan area for municipal and industrial ("M&I") use.

In April 1988, Appellant Washoe County entered into an agreement with Northwest Nevada pursuant to which Washoe County acquired an option to purchase all the interest in Northwest Nevada's water rights.[1] The agreement also provided Washoe County the right to change the place of use, manner of use, and rate of diversion of the water associated with Northwest Nevada's water rights.

In 1989, Washoe County applied to the Nevada State Engineer to change the use authorized under state law for the water resources on the Ranch to M&I use at Reno-Sparks. The Ranch's neighbors, the Army and the Tribe, objected to the granting of the application because of the

[1] Washoe County never exercised this option.

effect diverting water from the Honey Lake Valley to Reno-Sparks would have on them. Notwithstanding these objections, the State Engineer granted the application authorizing reallocation of the water represented by Northwest Nevada's water rights from agricultural use in the Honey Lake Valley to M&I use at Reno Sparks. The Nevada Supreme Court upheld the State Engineer's ruling. *See Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 918 P.2d 697 (Nev. 1996).

Neither party disputes that the only feasible method to transport the water from the water source on the Ranch to Reno-Sparks was by pipeline over federal land. So, in 1989, Washoe County applied to the Bureau of Land Management ("BLM") of the Department of the Interior for a right-of-way permit. In compliance with the requirement that prior to issuing a right-of-way permit the BLM must complete an Environmental Impact Statement ("EIS"), the BLM distributed a draft EIS for comment. Both the Army and the Tribe expressed objections to it. The decision as to whether to proceed further with development of a final EIS was elevated to the Secretary of the Interior. The Secretary was apprised of the objections to the granting of the right-of-way permit, including those expressed by the Army and the Tribe. In response, he issued an order in March 1994 directing the BLM to suspend work on the EIS until three issues were resolved with the concurrence of the United States Geological Survey, the Army, and the Tribe. Two of the three issues involved the Army's and the Tribe's objections to diverting water on the Ranch from the Honey Lake Valley. Washoe County was unsuccessful in obtaining the acquiescence of the Army and the Tribe for the right-of-way permit.

Therefore, Appellants could not proceed with their planned pipeline construction.

Appellants filed suit in the Court of Federal Claims claiming that the government's denial of Washoe County's right-of-way permit application constituted a taking of their water rights. The parties agreed that there were no genuine issues of material fact in dispute. The court granted the government's cross-motion for summary judgment and denied Appellants' motion for partial summary judgment after concluding that the government's actions did not effect either a physical or a regulatory taking.

Appellants filed a timely appeal and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

I

At the outset, the government argues that Appellants' takings claim is not ripe for review because the Secretary of the Interior never reached a final decision as to whether to grant or deny Washoe County's application for a right-of-way permit.[2] The government reasons that the Secretary's March 1994 order merely suspended further processing of Washoe County's application until progress was made on the issues mentioned in the order. The government likens this case to *Howard W. Heck & Associates, Inc. v. United States*, 134 F.3d 1468, 1471-72 (Fed. Cir.

[2] The government raised the ripeness issue in the Court of Federal Claims, but the court did not address it.

1998), in which this court held that the Army Corps of Engineers' removal of Heck's application for a Clean Water Act permit from active consideration, based on Heck's failure to submit the requisite information, did not constitute a final decision.

Appellants maintain that their takings claim is ripe for adjudication because the Secretary's March 1994 order constituted a final decision to deny Washoe County's application for a right-of-way permit under relevant Supreme Court precedent. Appellants reason that the Secretary ensured the failure of Washoe County's right-of-way application by granting veto power over the permit to the Army and the Tribe knowing that their interests were adverse to those of Washoe County.

We reject the government's position that ripeness is lacking and conclude that Appellants' takings claim is ripe for review. We review *de novo* whether the Court of Federal Claims possessed jurisdiction. *Wheeler v. United States*, 11 F.3d 156, 158 (Fed. Cir. 1993). Takings claims arising from the application of government regulations are not ripe until the government entity charged with implementing the regulation has reached a final decision. *MacDonald Sommer & Frates v. Yolo County*, 477 U.S. 340, 349-51 (1986). A takings claim is ripe, however, "once . . . the permissible uses of the property are known to a reasonable degree of certainty." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). Furthermore, a claimant must have first "followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion" so that the extent of the restriction on property is known. *Id.* at 620-21. "Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." *Id.* at

621; *see also MacDonald, Sommer & Frates*, 477 U.S. at 350 n.7. Thus, there is no requirement that a claimant "submit applications for their own sake" when there is no "uncertainty as to the [property's] permitted use." *Palazzolo*, 533 U.S. at 622.

Given the record in the instant case, it is clear that there was no further "reasonable and necessary step[ ]" Washoe County could have taken to allow the BLM an opportunity to exercise its full discretion in acting upon Washoe County's permit application. *Id.* at 620-21. Indeed, the government on appeal has not identified any further administrative step available to Washoe County in order for it to have obtained further finality in the permit application process other than suggesting that Washoe County could have filed an Administrative Procedure Act action in federal district court to compel agency action unlawfully withheld or unreasonably delayed. This is precisely why the government's reliance on *Heck* is misplaced. This court's determination that ripeness was lacking in *Heck* was premised on "Heck's unexcused failure to submit the statutorily-required state water quality certificate . . . to support its federal permit application." 134 F.3d at 1470. There is no dispute in this case that Washoe County complied with every requirement necessary to obtain a right-of-way permit. The sole reason Washoe County's permit application was not further processed in this case, i.e., by completing the requisite final EIS, was due to the Secretary's decision to suspend work on the EIS. *See* 43 C.F.R. § 2802.4(d)(1) (2002). Thus, unlike *Heck*, this is not a case in which the deficiency of completeness in the application process was attributable to the claimant.

In addition, that Washoe County was not going to be granted a pipeline right-of-way permit by the BLM was known to a reasonable degree of certainty. The Secretary's March 1994 order suspended work on the final EIS until issues pertaining to the Army's and the Tribe's objections to the granting of a right-of-way permit were resolved with their concurrence and to their satisfaction. It is unequivocally clear from the record, however, that the Army's and Tribe's interests in keeping the water on the Ranch were inalterably adverse to granting Washoe County's application for a right-of-way permit. Thus, the BLM's failure to grant a right-of-way permit was based on an unchanging fact, the Army's and Tribe's consistent opposition to a right-of-way permit that would allow Washoe County, and the other Appellants, to divert water on the Ranch to another location. *See Bayou des Familles Dev. Corp. v. United States*, 130 F.3d 1034, 1040 (Fed. Cir. 1997) (stating that a permit denial is final when the applicant has no appeal mechanism available and the denial is based on an unchanging fact). Allowing the government to prevent a claimant from pursuing a takings claim by conditioning approval of a claimant's permit request on the concurrence of another party who is reasonably certain not to provide such accord would not serve the purposes of the ripeness doctrine. *Palazzolo*, 533 U.S. at 620-21. Thus, we conclude that Appellants' takings claim is ripe for review and the Court of Federal Claims properly exercised jurisdiction.

II

As the case is ripe, we next turn to the merits of Appellants' takings claim. "Whether a taking compensable under the Fifth Amendment has occurred is a question of law based on factual underpinnings." *Bass Enter. Prod.*

Co. v. United States, 133 F.3d 893, 895 (Fed. Cir. 1998) (citations omitted). This court reviews the Court of Federal Claims' conclusions of law without deference. *Mass. Bay Transp. Auth. v. United States*, 254 F.3d 1367, 1372 (Fed. Cir. 2001); *Kane v. United States*, 43 F.3d 1446, 1448 (Fed. Cir. 1994); 5 U.S.C. § 706(2)(c) (2000).

On appeal, Appellants argue that the government's action preventing them from using their water rights amounted to a taking of that property by rendering their property useless under each of three distinct but related lines of authority. Specifically, relying on *Laney v. United States*, 661 F.2d 145 (Ct. Cl. 1981), Appellants first argue that by refusing to issue Washoe County a pipeline right-of-way across federal land, the government prevented them from using their property at the only location permitted by state law, Reno-Sparks, rendering their property useless. Appellants next rely on *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990), to argue that by conditioning Washoe County's ability to obtain a right-of-way permit upon receiving approval by the Army and the Tribe of the proposed use of the groundwater, the government gave these agencies veto power over whether Washoe County, and hence the other Appellants, could use their property, rendering their property valueless. Lastly, Appellants, relying on *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001), argue that by declining to grant Washoe County a right-of-way permit, the government ensured that their groundwater remained in the aquifer for use by the Army constituting a

literal taking of their water-rights property for government use.[3]

The government counters that Appellants have not established a taking and distinguishes the cases upon which they rely. The Court of Federal Claims granted the government's summary judgment motion and denied Appellant's motion for partial summary judgment after concluding that the government's actions did not constitute either a physical or a regulatory taking. We agree that Appellants have not established a taking of their property.

The Supreme Court has recognized two kinds of takings: physical takings and regulatory takings. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014-15 (1992). A physical taking generally occurs when the government directly appropriates private property or engages in the functional equivalent of a "'practical ouster of [the owner's] possession.'" *Id.* at 1014 (citation omitted). In the context of water rights, courts have recognized a physical taking where the government has physically diverted water for its own consumptive use or decreased the amount of water accessible by the owner of the water rights. *See Dugan v. Rank*, 372 U.S. 609, 625-26 (1963) (finding a taking where the government diverted water at a dam from downstream owners of water-rights for public purposes); *Int'l Paper Co. v. United States*, 282 U.S. 399, 407-08 (1931) (finding a taking where the government

[3] Appellants also cite *Dugan v. Rank*, 372 U.S. 609 (1963), and *Interantional* [sic] *Paper Co. v. United States*, 282 U.S. 399 (1931), in support of this argument.

ordered diversion of water from the owners of water-rights for use in government power production); *Tulare*, 49 F.3d Cl. at 320 (stating that a deprivation of water from the owner of the water rights amounts to a physical taking). Courts have also recognized a taking where the government denies all meaningful access to the claimant's private property. *See, e.g., Laney*, 661 F.2d at 147-49[4]; *Foster v. United States*, 607 F.2d 943 (Ct. Cl. 1979); *Drakes Ray Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970). With regard to "regulatory takings," although the Supreme Court has declined to set out a precise formula for determining whether a regulatory taking has occurred, these types of takings generally involve the regulation of private property. *See Lucas*, 505 U.S. at 1014-15.

The government did not effect a physical taking here because it neither physically appropriated nor denied meaningful access to Appellants' water rights. Appellants contend that by declining to grant Washoe County a pipeline right-of-way permit the government physically appropriated the water represented by their Reno-Sparks M&I rights for the government's own use by ensuring that the water remained in the aquifer. The cases relied upon by Appellants, however, do not support their position. Appellants place particular importance on *Tullare*, a case in which they contend the Court of Federal Claims found a taking based on government conduct directly analogous to that in this case.

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[4] As the government points out on appeal, the Court of Federal Claims did not find that a taking occurred in that case. Rather, in *Laney*, the court denied cross motions for summary judgment and remanded for further factual development. 661 F.2d at 150.

We conclude, however, that *Tulare* (which is not a binding precedent in this court) does not support Appellants' taking claim. In *Tulare*, the plaintiffs included county water districts that had contracted with a state agency for "the right to withdraw or use prescribed quantities of water" stored in a state water project. 49 Fed. Cl. at 315. To protect certain fish species pursuant to the Endangered Species Act, however, federal and state agencies restricted pumping from the water projects. *Id.* The Court of Federal Claims found that the contracts had conferred on plaintiffs an identifiable property interest in a stipulated amount of water and that the restrictions prevented the plaintiffs from receiving the full amount of water to which they were entitled under the contracts. *Id.* at 318-20. The court reasoned that the government had physically appropriated the plaintiffs' water because its actions were no different than if the government had physically diverted water for its own consumptive use. *Id.* at 319-20. In the instant case, the government has neither physically diverted or appropriated any water nor physically reduced the quantity of water that is available to the Appellants from the water source on the Ranch.

Cases finding a taking where the government denies all meaningful access to plaintiffs' private property also do not buttress Appellants' takings claim because the government did not deny Appellants access to their water rights. As the Court of Federal Claims recognized below, the government has not affected Appellants' water rights except by denying permission to use the government's own land to exploit those rights. Moreover, Appellants' constitutionally protected property was the right to use the water on the Ranch. *See Int'l Paper*, 282 U.S. at 407 (stating that petitioner's right was to the use of the water).

Thus, the State Engineer did not confer an additional or separate and distinct water right. The State Engineer only authorized a *change* in place and manner of use of its pre-existing water rights from agricultural use to M&I use. *See Pyramid Lake Paiute Tribe of Indians*, 918 P.2d at 698. Appellants still retained their right to use the water after the government denied Washoe County's pipeline right-of-way application. Indeed, Appellants do not dispute that they exercised that right by using the water for its original agricultural use, albeit because they were unable to perfect the new M&I use. *See, e.g.*, Nev. Rev. Stat. 533.060, 533.380, 533.395 (Appellants would need to actually put the water to the new use in the new location to perfect those new use water rights). Therefore, the government did not prevent Appellants from accessing their water rights. Because the government neither physically diverted or reduced the amount of water accessible by Appellants nor denied all meaningful access to their water rights, it did not effect a physical taking.

Appellants also have not established a regulatory taking because regulation of private property was not at issue here. *See Lucas*, 505 U.S. at 1014-15; *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 394-95 (1922); *United Nuclear Corp.*, 912 F.2d at 394-95. In *Lucas* and the other "regulatory takings" cases, property owners claimed that government regulation of their private property has gone "too far." 505 U.S. at 1014 (citation omitted). The government in the instant case, however, was not acting in its regulatory capacity when it denied Washoe County a right-of-way

permit.[5] Washoe County applied for a right-of-way to build a pipeline on federal land. Washoe County and the other Appellants had no right to build on federal land and thus no interest in the land. The government applied internal regulations concerning the federal government's management of public lands to determine whether to grant a right-of-way on property it owns. Thus, the government in no way imposed regulatory restrictions on the use of Appellant's private property, neither the land nor the groundwater rights appurtenant to the land. For example, the government did not limit the Appellants' access to their wells, restrict the amount of groundwater they could pump, or dictate what they could do with the water. Rather, the government was acting as a landowner whose neighbor sought permission to lay a pipeline across its property. However, the government had no obligation as a neighbor to assist Washoe County or the other Appellants in putting their water rights to the most profitable use or to pay just compensation because the State of Nevada granted Washoe County authorization under state law to make a particular use of the water on the Ranch. Because the government did not impose any regulations on Appellants' water rights, it did not effect a regulatory taking.

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[5] This is yet another reason *Laney* is distinguishable from this case. In *Laney*, the property at issue was subject to federal regulation of navigable waters. 661 F.2d at 146-48. Thus, the government was acting in its regulatory capacity when denying the property owner permission to construct a concrete pier and connect the pier to his island so that it would be accessible by boat. *Id.*

CONCLUSION

Having concluded that the government effected neither a physical nor a regulatory taking, we affirm the decision of the Court of Federal Claims granting summary judgment to the government and denying Appellants' motion for partial summary judgment.

COSTS

In accordance with Fed. R. App. P. 39(a), costs are taxed against the Appellants.

AFFIRMED

APPENDIX B

In the United States Court of Federal Claims

No. 98 637 L

(Filed: October 12, 2001)

* * * * * * * * * * * *	
WASHOE COUNTY, et al.,	
Plaintiffs,	
v.	THIS OPINION WILL NOT BE PUBLISHED.
UNITED STATES OF AMERICA,	
Defendant.	
* * * * * * * * * * * *	

Richard J. Conway, Dickstein, Shapiro, Morin & Oshinsky LLP, Washington, D.C., for plaintiff,

Fred R. Disheroon, United States Department of Justice, Washington, D.C., for defendant.

OPINION

HODGES, Judge.

Plaintiffs filed suit in this court claiming a taking because the Government restricted the use of their water rights. Plaintiffs applied to the Bureau of Land Management for a permit to build a pipeline over 30 miles of federal land. Defendant suspended the Environmental Impact Statement required to grant the permit due to concerns about the use of the water in the area. We grant defendant's motion for summary judgment.

BACKGROUND

Plaintiff-partner Northwest Nevada bought water rights in the Honey Lake Valley area. Plaintiffs intended to provide water for the cities of Reno and Sparks, Nevada, as a business venture. Once plaintiffs had purchased the water rights, they applied to the Nevada State Engineer to convert the water rights from agricultural use to municipal and industrial use. The state engineer authorized conversion of the agricultural water rights to water rights for municipal and industrial use. A municipal and industrial use is much more valuable than an agricultural use. The state engineer's ruling was upheld by the Nevada Supreme Court.

After the state engineer issued the permit, plaintiffs filed an application for a right-of-way across federal land. The Bureau of Land Management required an Environmental Impact Statement. The Pyramid Lake Indian Tribe and the Sierra Army Depot objected to the right-of-way. The Secretary of the Interior issued a memorandum stating,

> I find your position persuasive that issues related to groundwater modeling, Sierra Army Depot groundwater contamination, and Pyramid Lake Reservation trust responsibilities would preclude granting the right of way permits even if the Environmental Impact Statement (EIS) were completed . . . I therefore direct the BLM to suspend work of the EIS until these three issues are resolved . . . when that is accomplished, the National Environmental Policy Act process can be restarted.

Plaintiffs claim that this memorandum was final order denying them use of their water rights and effecting a taking of their property.

DISCUSSION

A. Physical Taking

Plaintiffs argue that the Government has rendered their water rights valueless by preventing their use. A physical taking occurs when the Government encroaches upon or occupies private land for its own proposed use. Permanent physical occupation of real property requires compensation under the Fifth Amendment. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982).

Physical takings cases generally address the plaintiff's interest in land being taken. In the present case, plaintiffs have no interest in the land. The land belongs to the Government. Plaintiffs must show they have a right to use the land or a right to the permit being sought.

The Supreme Court has recognized that government actions that do not encroach upon or occupy property can still affect and limit use to such an extent that a taking occurs. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

Plaintiffs argue that the Government's denial of their request to build the pipeline over federal land has resulted in a taking because this action has made their water rights useless. They claim they are unable to use the water rights because the water rights are granted for a

particular purpose – municipal and industrial use for Reno/Sparks.

This is not a taking. Plaintiffs could use the water for the municipal purpose if they could find another way to get it to Reno. The Government has not affected plaintiffs' water rights except for denying permission to use its land to exploit them. The water rights existed prior to the State engineer's issuing a change in use. Plaintiffs did not obtain water rights from the state engineer but only a change in use. The Government's action thwarted plaintiffs' business plans but did not limit their use of the water rights.

B. Regulatory Taking

Plaintiffs also claim a regulatory taking. A "categorical" taking is one in which all economic value has been taken by the regulatory imposition. *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354 (Fed. Cir. 2000). The Supreme Court in *Penn Central* set out three criteria for determining whether a regulatory taking has occurred: (1) the character of the governmental action, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation interfered with distinct investment-backed expectations. *See Loveladies Harbor v. United States*, 28 F.3d 1171, 1176-77 (Fed. Cir. 1994) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

If a regulation categorically prohibits all economically beneficial use of land – destroying its economic value for private ownership – the regulation has an effect equivalent to a permanent physical occupation. A compensable taking results. The owner is left with essentially no viable

economic uses and no rights except bare legal title. A purchaser who pays a substantial price for a parcel can be assumed to have expectations that the parcel can be used for some lawful purpose. When the Government seizes the entire estate for government purposes, whether by physical occupation or categorical regulatory taking, it is not necessary to explore what those expectations may have been. *Palm Beach*, 231 F.3d at 1364.

Government regulation was not an issue here. Plaintiffs submitted a request for a right of way to build on federal land. They had no right to build on the land, so they had no interest in the land. Plaintiffs claim that because of the Government's action on the permit, the water rights cannot be used and have become worthless. Even though plaintiffs were not permitted to build a pipeline, that denial did not alter their water rights in any way. Plaintiffs were denied their request to use the Government's property. Defendant has no obligation to make it profitable for plaintiffs to use their water rights.

C. *Laney*

Plaintiffs filed a memorandum on October 9, directing the court's attention to a case that they consider to be controlling. *Laney v. United States*, 661 F.2d 145 (Ct. Cl. 1981). However, *Laney* was a denial of cross motions for summary judgment. Plaintiff's motion was denied because to grant it "we would have to decide the frustration of the 'highest and best' (i.e., most profitable) use by regulation, is per se a taking. . . . " *Id.* at 149. The *Laney* court ruled that frustration of plaintiff's desire to make the most profitable use of his island could not create a per se taking.

According to plaintiffs here, "[b]ecause the only feasible way to transport water from plaintiffs' land . . . is through a pipeline over defendant's land . . . , defendant's denial of a pipeline easement has completely eviscerated plaintiffs' property and deprives plaintiffs of all economic use of that property." However, defendant's relationship with plaintiffs is that of a neighboring landowner, not a regulator.

Plaintiffs' own description of the *Laney* court's holding is that "valid agency action taken with respect to land subject to federal regulatory authority can constitute a taking of adjacent property that is not subject to the same federal regulatory authority, where the agency action denies property owners the access they require to utilize their property rights." Again, the only basis for federal control of the real property at issue here is that the Government *owns* it.

In this case, the Government is not acting in its regulatory capacity. It is acting as a landowner whose neighbor seeks its permission to dig a pipeline across its property. Most landowners could not imagine that a neighbor would require them to grant an easement for a commercial venture because otherwise it would not be profitable. We are not aware of a case in which the Government as landowner has been required to do so either.

CONCLUSION

Counsel for the parties agree that there are no genuine issues of material fact in dispute. We find that defendant is entitled to judgment as a matter of law. Defendant's cross-motion for summary judgment is

GRANTED; plaintiffs' motion for partial summary judgment is DENIED. The Clerk will dismiss plaintiffs' complaint. No costs.

/s/ Robert H. Hodges, Jr.
Robert H. Hodges, Jr.
Judge

In the United States Court of Federal Claims

No. 98-637L

WASHOE COUNTY, et al.,

v.

THE UNITED STATES

JUDGMENT

(Filed Oct. 12, 2001)

Pursuant to the court's Opinion, filed October 12, 2001, granting defendant's cross-motion for summary judgment, and denying plaintiffs' motion for partial summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

Margaret M. Earnest
Clerk of Court

October 12, 2001 By: /s/ Lisa L. DeFrade
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

APPENDIX C

In the United States Court of Appeals for the Federal Circuit

ORDER

(Filed Mar. 27, 2003)

Before CLEVENGER, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and PROST, Circuit Judge.

A petition for rehearing having been filed by the APPELLANT*,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is DENIED.

The mandate of the court will issue on April 3, 2003.

FOR THE COURT,

/s/ Jan Horbaly (AVV)
Jan Horbaly
Clerk

Dated: March 27, 2003

cc: Richard J. Conway
Ethan G. Shenkman
Brian Sandoval

WASHOE COUNTY V US, 02-5039
(CFC – 98-CV-637)

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* The Nevada State Engineer filed an amicus curiae brief.

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Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

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